SUPREME COURT, U. S.

SEP 8 1967

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 462.

MRS. JOHN FAIN and C. W. DUNCAN, Administrator of the Estate of Mrs. T. H. Duncan, Deceased,
Petitioners,

v.

W. RAY DUNCAN,
Respondent.

On Petition for Certiorari to the Court of Appeals, Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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MAY IT PLEASE THE COURT:

OPINION BELOW.

The opinion of the Court of Appeals is reported under the name **Duncan v. Duncan**, 377 Fed. 2d 49.

JURISDICTION.

The jurisdictional statement in the petition for certiorari is correct.

QUESTIONS PRESENTED.

This is a run-of-the-mill automobile damage suit. In a one-automobile collision with a bridge abutment, two guests sued the respondent, who joined issue on whether he was in fact driving at the time and on the negligence alleged. The sole eyewitnesses were the occupants of the vehicle, all of whom were injured and whose recollections ranged from vagueness to amnesia. The trial was short, the issues clear to laymen of ordinary understanding. There was no misconduct of the trial or any other undesirable element to affect the verdict. The jury specifically absolved the driver from negligence. On motion of petitioners here, the District Judge granted a new trial on the ground of his dissatisfaction with the verdict as being against the weight of the evidence. On appeal, the Court of Appeals, Sixth Circuit, found that the District Judge had abused his discretion. It reversed and remanded with directions to reinstate the verdict in favor of respondent. The questions presented are:

1. Whether the abuse of discretion by a United States district judge in granting a new trial is immune from review by the courts of appeal.

2. Whether the Court of Appeals disregarded the Tennessee rule of *res ipsa loquitur*.

REASONS FOR DENYING THE WRIT.

No decision of this Court denies the courts of appeal the power to correct a palpable abuse of discretion by a district judge in ordering a new trial in a jury case. The courts of appeal are unanimous in asserting that the power exists. The Seventh Amendment presents no bar; its function is to preserve, not to limit, a litigant's right to a lawful verdict. The extremely rare instances of reversal

of a district judge's decision on this ground demonstrate the insignificance of the question presented by the petition for certiorari.

The petition fails to show that the Court of Appeals decided any important state question in a way in conflict with applicable state law. The Tennessee decisions cited by petitioners are not in point.

Hence there are no special or important reasons for granting the writ under U. S. Supreme Court Rule 19.

ARGUMENT.

I. Appellate Power to Review Facts.

The Court of Appeals, after a careful review of the facts, found that the District Court had abused its discretion in granting a new trial on the ground that the verdict was against the weight of the evidence. **Duncan v. Duncan**, 377 Fed. 2d 49, 55. The petition for certiorari does not question this evaluation of the District Court's action by the Court of Appeals. The narrow question here, then, is whether a Court of Appeals has the power to make such a determination.

As the petition for certiorari (page 7) points out, there is no division of opinion among the courts of appeals of the various circuits on the proposition that they do have the power to reverse the action of a district court on motion for new trial. Professor Moore lists the Courts of Appeals of the first, third, fourth, sixth, seventh, ninth and tenth circuits and the District of Columbia as recognizing the rule that they may review a judgment on motion for new trial to determine if an abuse of discretion occurred. **6A Moore's Federal Practice**, Paragraph 59.08 (6), pages 3836-3839. Of the three circuits omitted from Professor Moore's enumeration:

(a) In **Berner v. British Commonwealth Pacific Airlines, Ltd.**, 346 Fed. 2d 532, 541, certiorari denied 382 U. S. 983, the second circuit said, "To order a new trial on the asserted ground when there was sufficient evidence to go to the jury need not be an abuse of discretion in every case . . . but we find it was in this case. In light of the possible inferences as to what actually happened when the pilot began his let-down, we cannot agree that viewed in the light of the proper standard, the verdict could be called against the weight of the evidence."

(b) In **Georgia-Pacific Corp. v. U. S.**, 264 Fed. 2d 161, 166, the fifth circuit said, "The refusal of a court to grant a new trial was a clear abuse of discretion. The judgment

is, therefore, reversed and the cause is remanded with directions to grant a new trial."

(c) In **Solomon Dehydrating Co. v. Guyton**, 294 Fed. 2d 439, 447, the eighth circuit said, "We are not sure that this circuit is quite the 'adamant expounder' of the doctrine of nonreviewability which Professor Moore and Judge Medina (by quoting Moore, at page 800 of 289 F. 2nd) would make us out to be. Our expressions in the Botts, Curl, Williams, Agnew, Casura, Anderson, Ferguson and Ridgway cases, all supra, could be said to contraindicate that."

The repeated denial by this Court of certiorari to courts of appeals which have announced the foregoing rule, which for practical purposes is now unanimous, negates the assertion in the petition for certiorari (9, 11) that uncertainty exists. Particularly, this court denied certiorari in **Lind v. Schenley Industries, Inc.**, 278 Fed. 2d 79 (Third Circuit 1960), 364 U. S. 835; and in **Berner v. British Commonwealth Pacific Airlines, Ltd.**, 346 Fed. 2d 532 (Second Circuit 1965), 382 U. S. 983.

In **Dagnello v. Long Island Railroad Co.**, 289 Fed. 2d 797, the second circuit addressed itself directly to the constitutional question sought to be raised by the instant petition. In that case, Judge Medina exhaustively reviewed the applicable authorities and correctly pointed out that the decisions of this Court, so far as they go, "would seem to indicate that the power exists" for review of the action of the trial court on motion for new trial.

Nor do the cases relied on by the petitioners here support the proposition that the Seventh Amendment precludes review by a court of appeals. In their case of main reliance, **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474, 485, this Court stated, "Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that

the trial judge abused his discretion, we have no occasion to determine." In **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150, 247, this Court stated that the action of the trial judge was not reviewable on certain defendants' appeal, "unless they can establish that such action was so clearly prejudicial to them that the denial of their motions constituted a plain abuse of discretion." **United States v. Johnson**, 327 U. S. 106, did not involve a verdict at all, but a trial court's finding of fact.

Judge Medina in **Dagnello**, *supra*, further points out the flaw in petitioners' historical argument. It was not the rule at comon law in 1791 that the opinion of a single judge sitting *nisi prius* was conclusive on motion for new trial. Motions for new trial were not addresssed to the trial judge but were made at Westminster. They were heard *en banc* by four of the judges, and the trial judge in a particular case might or might not be one of the four.

It is an answer to petitioners' contention to state it in its simplest terms. They would have the Court say that the Seventh Amendment, adopted to guarantee trial by jury, means that a verdict winner can have his verdict taken away from him repeatedly, without cause, and without appellate supervision until an adverse verdict is finally returned or he abandons the pursuit of his cause through the exhaustion of determination or financial resources. It is respectfully submitted that this Court will never countenance such a perversion of common sense.

II. The Erie Doctrine.

The petition for certiorari incorrectly asserts that the Court of Appeals ignored Tennessee law.

The case of main reliance here is **Whitley v. Hicks**, 207 Tenn. 683. The facts in that case are clearly distinguishable. In the Whitley case, the defendant driver testified, "I just lost control of the car. That's all." The injured guest plaintiff was rendered unconscious in the accident

and remembered nothing about it. The only other witness was the occupant of the rear seat of the automobile. Her head was lying on the back of the seat and she was not watching the driving.

In the instant case, it was the respondent who had no recollection of the accident (150a). All facts of the accident were fully accessible to the plaintiffs below and to petitioners' principal witness, respondent's wife, who was seated, according to her testimony, on the front seat of the automobile.

Under Tennessee law, the *res ipsa loquitur* doctrine rests on the assumption that evidence of the true cause of the accident is accessible to the defendant and inaccessible to the person injured. **Coca Cola Bottling Works v. Sullivan,** 178 Tenn. 405.

Under Tennessee law, the *res ipsa loquitur* doctrine is inapplicable where there is pleading and proof of specific acts of negligence. **Schindler v. Southern Coach Lines, Inc.,** 188 Tenn. 169.

Under Tennessee law, the mere fact that an automobile skids on slippery pavement does not of itself constitute evidence of negligence on the driver's part, so as to render the *res ipsa loquitur* doctrine applicable. **Hatch v. Brinkley,** 169 Tenn. 17.

The petition for certiorari relegates to a footnote the case of **Tennessee Driver v. Smith,** 47 Tenn. App. 505. Apparently the reference to this case arises from the fact that there was an issue as to whether the respondent or his wife was driving the car at the time of the accident. Presumably this case is cited for the authority that the respondent as owner of the automobile was responsible for the negligent operation of it by a member of his family under the Tennessee Family Purpose Doctrine. This clearly has no application to the instant case because the owner's responsibility under that doctrine arises only from negligent operation of the vehicle. It was incumbent upon

the petitioners to prove negligence on the part of someone. Petitioners alleged that the negligence was that of respondent (4A). Petitioners sought to prove negligence on the part of respondent only, through the testimony of the aged petitioner, Mrs. Fain (35A) and of respondent's wife (45A), whose testimony was impeached (61A, 69A, 75A). These efforts failed to persuade the jury that anyone was guilty of negligence.

CONCLUSION.

1. The Seventh Amendment presents no bar to review by courts of appeals of abuse of discretion by trial courts in dealing with motions for new trial. There is no decision of this Court forbidding such review, and its decisions indicate that such review is permissible. The courts of appeals are unanimous in asserting that they have the power. The extremely rare reversals show not only what respect the courts of appeals accord the discretion of the trial courts, but also that the problem sought to be raised by the petition is inconsequential.

2. The petition for certiorari cites no law of Tennessee requiring a result contrary to that reached by the Court of Appeals in this case, and no such law exists.

Respectfully submitted,

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